IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.15820 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THE EXECUTIVE ENGINEER & ORS. - Petitioner
Versus
SHANTUBEN CHHAGANBHAI MAKWANA - Respondent

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Appearance :
MR HUKUM SINGH, AGP for Petitioners.
MR H.S.MULIA for Respondent.

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 08/08/2007

ORAL JUDGMENT

1. Heard learned Assistant Government Pleader Mr.Hukum Singh, for the petitioners and Mr.H.S. Mulia, learned Advocate appearing for respondent workman in this petition.

2. Through this petition, petitioners are

challenging the award made by the Labour Court, Surendranagar, in Reference (L.C.S.) No.128 of 2000 dated 13.02.2007 whereby Labour has allowed the reference in part and granted reinstatement in favour of the workman concerned without back wages for interim period by directing the petitioners establishment to reinstate the workman concerned on her post within thirty days from the date of publication of award without back wages for interim period.

3. Learned AGP Mr.Hukum Singh for the petitioners submits that before the Labour Court, detailed reply was filed by the petitioners wherein none of the averments made in the statement of claim was admitted. The petitioners had disputed working days and working years of the respondent workman. Continuous service of the workman concerned was also denied by the petitioners. According to the petitioners, in seniority register, name of the present respondent is not noted and, therefore, she is not considered to be employee of the petitioners. It was also disputed by the petitioners that the concerned workman has completed 240 days continuous service as alleged and in view of that, it was contended that the question of giving notice or notice pay in lieu thereof and retrenchment compensation to the workman concerned does not arise and no new workmen were recruited/engaged by petitioners after termination of services of the workman concerned. He submits that the Labour Court

has committed gross error in not appreciating these contentions raised by petitioners in its written statement. He submits that Labour Court has committed gross error in granting relief in favour of the workman. He submits that when section 25F of the ID Act, 1947 was not violated by petitioners, question of non-compliance of the mandatory provisions contained therein was not arising and, therefore, Labour Court ought not to have granted such relief of reinstatement. He also submits that none of the workman was completing 240 days continuous service as alleged and no concrete evidence was produced by the workman before the Labour Court. As per his submission, oral evidence of the witness for the petitioners namely Rameshbhai K. Delwadia Exh.17 was also not properly appreciated by the Labour Court and, therefore, award in question is required to be set aside by dismissing the reference of the workman concerned. Except these submissions, no other submission was made by learned AGP Mr.Hukum Singh before this Court and no decision whatsoever was cited by Mr.Hukum Singh, learned AGP for petitioners before this Court in support of his submissions as aforesaid.

4. Learned Advocate Mr. Mulia appearing for the respondent has, while supporting the award in question, submitted that the evidence of the workman on affidavit had remained unchallenged in cross examination by the petitioner. He submits that at the time of terminating services of the workman

concerned, junior employees were retained and continued in service and subsequently fresh workmen were also engaged by the petitioners as daily wager and at that time, petitioners had not given offer of work to the workman concerned and, therefore, Labour Court has rightly set aside the order of termination and rightly granted reinstatement alone. He also submits that the seniority list was not published by the petitioners and no documentary evidence whatsoever was produced by petitioners in support of the contentions raised by petitioner in his written statement, in respect of presence card, wage slip, identity card and muster roll of the workman working in the establishment of petitioner and, therefore, Labour Court was right in considering the evidence on record and rightly relied upon the decision of the apex court in case of RM Yellatti versus Asstt.Executive Engineer, reported in 2005 (9)SCALE 139 = 2006 (1) SCC 106. He also submits that the Labour Court has rightly exercised the jurisdiction vested in it and has not committed any error in law or facts in granting reinstatement in favour of the workmen concerned and, therefore, no interference of this court is warranted in exercise of the powers under Article 227 of the Constitution of India.

5. I have considered the submissions made by both the learned Advocates. I have also perused the award in question passed by the Labour Court, Surendranagar. Industrial dispute was referred to for adjudication on 28.09.2000. Statement of claim was

filed by workman wherein it was alleged that the respondent workman was remaining in service for about twelve years and her services were terminated in August 1985. It was also contended that the workman had completed 240 days continuous service in one year preceding the date of alleged termination of her services and therefore action of termination of her service was violative of the mandatory provisions of section 25F of the ID Act, 1947. Reply to the statement of claim was filed by the petitioners. Thereafter, affidavit of each respondent-workman was filed by workman; the petitioners had cross examined the workman and thereafter, vide Exh.17, witness for the petitioners namely Shri Rameshbhai K.Delvadia was examined before the Labour Court and thereafter, Labour Court has examined the matter and gave findings after considering the record and evidence on record.

6. Labour Court has come to the conclusion the oral evidence of the workman concerned vide Exh.13 had remained uncontroverted in cross examination by the petitioners before the Labour Court. Labour court also considered that the seniority list was not published by the petitioners before passing order of termination against workman concerned. Labour court also appreciated that no muster card, presence card, wage slip, identity card were supplied by the petitioners to respondent-workman and, therefore, workman concerned was having no material with her except to contend on oath before the Labour Court

that she was working for 12 years continuously and has also completed 240 days continuous service in a year preceding the date of termination and that part of their oral evidence was cross examined by the petitioners before the Labour Court. Therefore, Labour Court considered the decision of the Hon'ble Apex Court in case of RM Yellatti versus Asstt.Executive Engineer, reported in 2005 (9)SCALE 139 and also came to the conclusion that the respondent has proved completion of 240 days continuous service and, in view of the non compliance of section 25F of the ID Act, 1947, action of termination of her service is violative of Sec. 25F of the ID Act, 1947. Thus, Labour Court has recorded clear finding that 240 days continuous service was proved by the workman and the petitioners have violated section 25F of the ID Act, 1947.

7. Labour court has also come to the conclusion that Section 25-G and H has also been violated by the petitioner. Therefore, Labour Csourt granted reinstatement without back wages for interim period in favour of the workman concerned.

8. Most relevant and important aspect of the matter is that the evidence of the workman concerned on affidavit, Exh.13, has remained unchallenged and uncontroverted in cross-examination by the petitioners. Second important thing is that the petitioners have not supplied any document to the workman concerned from the date of her appointment or

engagement till the date of her termination of service. As per the case of the workman concerned, she was not supplied any identity card or wage slip from which the workman can establish completion of 240 days continuous service by leading proper evidence. These facts have been also admitted by the witness for petitioner Ramesh K. Delvadia vide Exh.17.

9. Third important thing is that the muster roll wherein the presence of the workman concerned was being marked by the petitioners or wage slip on the basis of which wages were being paid by petitioners to workman concerned were in custody of the petitioners and yet they were not produced and proved before the Labour Court by petitioners for rebutting the assertions of workman concerned. So, documents which were relevant and material for rebutting the case of workman which were in custody of petitioners were not produced and proved by petitioners before the Labour Court and, therefore, Labour Court was right in drawing an adverse inference against the petitioners for withholding of the best documentary evidence possessed by it. Seniority list was not published and at the time of termination, employees junior to the respondent were continued by petitioner and subsequently also, fresh workmen were engaged and recruited by petitioners without first offering such work to the workman concerned. Such evidence of the workman concerned had remained uncontroverted and unchallenged in cross-

examination of the respondent and petitioners not produced any documentary evidence for rebutting the case of the respondent though same was available with the petitioners. Labour Court has appreciated the evidence on record and come to the conclusion that the publication of seniority list is mandatory but that has not been done and that was the vital defect while terminating services of the workman concerned. Labour court has also considered the various decisions of this court as well as Bombay High Court and Apex Court and set aside the order of termination on the ground that the same is violative of the provisions of section 25F, 25G and 25H of the ID Act and granted reinstatement with continuity of service.

10. Law on this subject has recently been examined by the Apex Court and decided that in such circumstances when the workman is not having any evidence to prove completion of 240 days continuous service within one year, then, in such circumstances, employer shall have to produce documentary evidence which are in possession of the employer and if the evidence of the workman has not been challenged in cross examining the workman concerned, then labour court has right to believe the oral evidence of workman. In RM Yellatti versus Asstt.Executive Engineer, reported in 2005 (9)SCALE 139 = 2006 (1) SCC 106, this aspect has been examined by the apex court. It has been observed by the apex court in paras 17, 18 and 19 as under:

"17. Analyzing the above decisions of this Court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings under section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforestated judgments, we find that this court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workmen stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily waged earner, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance ultimately would depend thereafter on facts of each case. The above decisions however make it clear that mere affidavits or self serving statements made by the claimant/workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non production of muster rolls per se without any plea of suppression by the claimant workmen will not be the ground for the tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down basic principle, namely, that the High Court under Art. 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the labour court unless they are perverse. This exercise will depend upon facts of each case.

18. Now applying the above decision to the facts of the present case, we find that the workman herein had stepped in the witness box.

He had called upon the management to produce the nominal muster rolls for the period commencing from 22/11/1988 to 20/6/1994. This period is the period borne out the certificate (Ex. W1) issued by the former Asstt. Executive Engineer the evidence in rebuttal from the side of the management produce five nominal muster rolls (NMRs), out of which 3 NMRs, Ex.M1, Ex.M2 and Ex.M3, did not even relate to the concerned period. The relevant NMRs produced by the management were Ex. M4 and Ex. M5, which indicated that the workmen had worked for 43 days during the period 21/1/1994 to 20/2/1994 respectively. There is no explanation from the side of the management as to why for the remaining period the nominal muster rolls were not produced. The labour Court has rightly held that there is nothing to disbelieve the certificate (Ex.W1). The High Court in its impugned judgment has not given reasons for discarding the said certificate. In the circumstance, we are of the view that the Division Bench of the High Court ought not to have interfered with the concurrent findings of fact recorded by the Labour Court and confirmed by the learned Single Judge vide order dated 7/6/2000 in writ petition No. 17636 of 2000. This is not, therefore, a case where the allegations of the workmen are founded merely on an affidavit. He has produced cogent evidence in support of his case. The workmen was working in SD 1, Athani and Ex. W1 was issued by the former Asstt. Executive Engineer, Hipparagi Dam Construction Division No. 1, Athani-591304. In the present case, the defence of the management was that although Ex. W1 refers to the period 22/11/1988 to 20/6/1994, the workmen had not worked as a daily wager on all days during that period. If so, the management was duty bound to produce before the Labour Court the nominal muster rolls for the relevant period, particularly when it was summoned to do so. We are not placing this judgment on the shifting of the burden. We are not placing this case on drawing of

adverse inference. In the present case, we are of the view that the workmen had stepped in the witness box and his case that he had worked for 240 days in a given year was supported by the certificate (Ex.W1). In the circumstances, the Division Bench of the High Court had erred in interfering with the concurrent findings of fact.

19. Before concluding, we would like to make an observation with regard to cases concerning retrenchment/termination of services of daily waged earner, particularly those who are appointed to work in Government departments. Daily waged earners are not regular employees. They are not given letters of appointments. They are not given letters of terminations. They are not given any written document which they could produce as proof of receipt of wages. Their muster rolls are maintained in loose sheets. Even in cases, where registers are maintained by the Government departments, the officers/clerks making entries do not put their signatures. Even where signatures of clerks appear, the entries are not countersigned or certified by the appointing authorities. In such cases, we are of the view that the State Governments should take steps to maintain proper record of the services rendered by the daily wagers; that these records should be signed by the competent designated officers and that at the time of termination, the concerned designated officers should give certificates of the number of days which the labourer/daily wager has worked. This system will obviate litigations and pecuniary liability for the Government."

11. Recently, on 8th March, 2007, Apex Court has considered same issue in case of M/s. *Sriram Industrial Enterprises Ltd. Versus Mahak Singh & Ors. reported in 2007 (3) Supreme Today page 553*. In the

said decision, the apex court has considered the decision in case of *Range Forest Officer v. ST Hadimani reported in (2002) 3 SCC 25* and other all relevant decisions including the decision in case of *Surendranagar District Panchayat versus Dahyabhai Amarsinh (2005) 8 SCC 750*. In the said decision, the apex court has also considered the earlier three Judges decision of the apex court in case of *RM Yellatty v. Assistant Executive Engineer (2006) 1 SCC 106*. Ultimately, after considering all relevant decisions in respect of onus of proof, whom to prove 240 days continuous service and how to discharge such burden by the workman and presumption of non production of documents by the employer. Relevant observations made by the Apex Court in paras 23 and 34 of the said decision are reproduced as under:

> "23. Regarding Mr. Desai's submission that this Court had consistently laid down that it is for the workmen to prove that they had worked for 240 days in a calendar year, Mr. Viswanathan submitted that this Court had in the case of R.M.Yellatty vs Assistant Executive Engineer, reported in (2006) 1 SCC 106, observed as under:
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> *Analyzing the above decisions of this Court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings under section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforestated judgments, we find that this court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workmen stepping in the witness box. This burden is*

discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily waged earner, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance ultimately would depend thereafter on facts of each case. The above decisions however make it clear that mere affidavits or self serving statements made by the claimant/workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non production of muster rolls per se without any plea of suppression by the claimant workmen will not be the ground for the tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down basic principle, namely, that the High Court under Art. 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the labour court unless they are perverse. This exercise will depend upon facts of each case.'

34. Having correctly interpreted the provisions of Section 6N of the UP Act, the High Court rightly drew an adverse presumption for non-production of the Attendance Registers and the Muster Rolls for the years 1991 onwards. The best evidence having been withheld, the High Court was entitled to draw such adverse inference. The views expressed by this Court on the question of burden of proof in case of range Forest Officer's case (supra) were watered down by the subsequent decision in R.M. Yellatty's case (supra)and in our view the workman had discharged their initial onus by production of the documents in their possession."

12. Second question is Section 25-G and 25-H, whether applicable in case when section 25F has not been violated or when workman has not completed 240 days continuous service, then whether section 25G and 25H would apply or not. Of course, this question is not relevant in view of the facts of the present case on hand because in this case, Labour Court has given clear finding that there has been violation of section 25F of the ID Act and Labour Court has also held that the workmen concerned have completed 240 days continuous service. However, this case has been examined by this court that section 25G and 25H of the ID Act, 1947 are independent and distinct sections and for claiming benefit thereof, it is not necessary for the workman to contend and prove that there has been breach of section 25F of the ID Act, 1947. Moment, termination of workman is covered by the definition of 'retrenchment' under section 2(oo), then, irrespective of the fact whether she/he has been completing 240 days continuous service or not, court can independently examine as to whether Section 25G and 25H are followed by the employer or not as decided by this court (Coram: Hon'ble Mr.Justice M.R.Shah,J.) in SCA No. 6262 of 2005 with SCA No. 12616 of 2005 dated 25th July, 2005. In said matter, this court has observed as under in para 12, 13, 14 and 15:

> *"12. The Labour Court on appreciation of the evidence and considering the fact that the workman has worked only for 3 days in the year 1983 and for 69 days in all in the year 1984-85 as Daily Wager, has held that as the*

workman has not completed 240 days in the preceding year of retrenchment, there is no breach of Section-25-F of the Industrial Disputes Act. However, considering the fact that new employees came to be appointed on 19.12.1995, the Labour Court has on appreciation of evidence held that there is breach of Section-25-G of the I.D.Act by not calling upon the workman for reemployment. This is finding of fact arrived at by the Labour Court on appreciation of evidence which is not required to be interfered by this Court in exercise of the powers under Articles 226 and 227 of the Constitution of India. Under the circumstances, finding given by the Labour Court that there is breach of Section-25-G of the I.D.Act, in my opinion, is not required to be disturbed and the same is not disturbed and is accordingly confirmed.

13. The next question is with regard to the contention raised on behalf of the management relying upon the judgment of the Division Bench of this Court in case of STATE OF GUJARAT V. RAMESH MOPABHAI RATHOD, 2003 (3) GLR 2590 that for attracting and applicability of Section-25-G and 25-H of the I.D.Act, retrenchment covered by Section-25-F is must, is required to be considered by this Court. Firstly, it is required to be noted that in the said case, the said controversy was not directly involved and on facts, it was found that there was no retrenchment by the employer at all and the Division Bench was considering the same and has made the passing observations which reads as under :

> *"Apart from that, the attractability or the applicability of Sections-25-G and 25-H would be dependent on the emergence and existence of the condition precedent of retrenchment."*

The aforesaid observation seems to be concerning the facts of that case where it was found that there was no retrenchment at all by the employer. Therefore, contention of

Shri Clerk, learned advocate for the management corporation that for applicability and attractability of Sections-25-G and 25-H, retrenchment covered by Section-25-F is must, is not correct and cannot be accepted. Even otherwise, as held by the Hon'ble Supreme Court of India in case of CENTRAL BANK OF INDIA (Supra), benefit of Section-25-H would not be confined to the category of the retrenched workmen covered by Section-25-F alone who have been in continuous service for not less than one year. It appears from the judgment and order passed by the Division Bench of this Court relied upon by Shri A.K.Clerk, learned advocate appearing on behalf of the management corporation, attention of the Division Bench was not drawn to the decision of the Hon'ble Supreme Court in case of CENTRAL BANK OF INDIA (Supra) and the Division Bench has not considered the said binding decision.

14. At this stage, the judgment of the Hon'ble Supreme Court in the case of GOVT OF A.P. V. B. SATYANARAYANA RAO, reported in (2000) 4 SCC 262 is required to be considered. While considering the rule of per incurim, the Hon'ble Supreme Court in the said decision in para-8 has held as under :

> *"The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."*

15. There is one another decision of this Court also in case of BHARAT INDUSTRIES V. KHEMIBEN VALJIBHAI AND OTHERS, 1995(1) GLH (UJ) 6 where also, similar view is taken with regard to applicability of Section-25-G and 25-H to those employees irrespective of completion of 240 days and / or retrenchment as envisaged under Section-25-F of the I.D.Act. Considering the fact that the Division Bench of this Court in cited

decision of STATE OF GUJARAT V. RAMESH MOPABHAI RATHOD, 2003 (3) GLR 2590 has not considered the decision of the Hon'ble Supreme Court in case of CENTRAL BANK OF INDIA (Supra) which is a superior court judgment, assuming that the same meaning is to be given to the judgment of the Division Bench in case of STATE OF GUJARAT V. RAMESH MOPABHAI RATHOD as suggested on behalf of the management, in that case also, considering the judgment of the Hon'ble Supreme Court, the same is not required to be considered treating it as per incuriam."

13. In view of the above observations made by this court while examining the award in question, in view of the law on the subject, after considering the recent decisions of the Apex Court, according to my opinion, Labour Court was right in appreciating the evidence before it and the Labour Court was also right in drawing an adverse inference against the petitioners in view of the fact that the petitioners had cross examined evidence of workman Exh.13 and also not produced any documentary evidence which was in its custody and that aspect was also admitted by even witness for petitioner namely Mr.Delvadia at Exh.17 and, therefore, according to my opinion, Labour Court has not committed any error in passing the award in question and the award of the Labour Court would therefore not call for any interference of this court in exercise of the powers under Article 227 of the Constitution of India.

14. Learned AGP Mr.Hukum Singh has not been able to point out any legal infirmity in the award in question. He has also not been able to point out any

jurisdictional error committed by the Labour Court. He has also not been able to point out that the findings given by the Labour Court are contrary to the facts on record or that the same are perverse in nature. This Court cannot interfere with the findings of fact unless same are perverse or contrary to record, even if two views are possible this Court cannot interfere with finding of fact. Therefore, according to my opinion, impugned award does not call for any interference and, therefore, the petition is required to be dismissed.

15. In result, the petition is dismissed. Notice is discharged. No order as to costs.

(H.K. Rathod,J.)

Rajendra